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IN THE UNITED STATES DISTRICT COURT

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

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KATHLEEN HANNI, individually and on behalf of all others similarly situated, TIMOTHY T. HANNI, CHASE L. COSTELLO, and LANDEN T. HANNI, a minor, by and through his parent and Natural Guardian, Kathleen Hanni,

No. C 08-00732 CW

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ORDER DENYING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION, GRANTING DEFENDANT'S

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MOTION FOR SUMMARY JUDGMENT AND DENYING COLLEEN O'CONNER'S MOTION FOR INTERVENTION

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AMERICAN AIRLINES, INC., and DOES 1 through 20, inclusive,

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Defendants.

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On December 29, 2006, the Dallas-Fort Worth area experienced unseasonably severe weather that generated massive lightning storms and a tornado warning, all of which caused the airport to shut down. As a result, American Airlines diverted over 100 flights and many passengers were stranded on the tarmac for several hours. Only September 11, 2001 recorded more diversions than December 29, 2006. Plaintiffs were some of the many passengers on diverted American Airlines' aircraft on that date. They sued Defendant American Airlines under many legal theories for its conduct surrounding the delays.

After several rounds of motions to dismiss, Plaintiffs' claims have been narrowed to three:

3 (1) A negligence claim based on Defendant's failure to  
4 provide adequate food, water, restroom facilities and  
5 ventilation in violation of its duties as a common  
6 carrier,

7 (2) a breach of contract claim based on paragraph five of the  
8 Conditions of Carriage (COC) or the portions of paragraph  
9 eighteen of the COC identified in paragraphs 124(e) and  
10 (g) of the First Amended Complaint and

11 (3) a conversion claim.

9       Defendant has moved to adjudicate these claims summarily and  
10 to deny class certification. Plaintiffs have moved for summary  
11 judgment on the contract claim, class certification and leave to  
12 file a motion to reconsider the Court's order dismissing  
13 Plaintiffs' false imprisonment cause of action. Colleen O'Connor  
14 has also filed a motion to intervene. The Court addresses these  
15 motions in detail below but, in sum, the Court (1) denies  
16 O'Connor's motion to intervene; (2) grants Defendant's motion to  
17 deny class certification and denies Plaintiffs' motion for class  
18 certification; (3) grants Defendant's motion for summary judgment  
19 and denies Plaintiffs' motion for partial summary; and (4) grants  
20 Plaintiffs' motion for leave to file a motion for reconsideration.

## BACKGROUND

22 Throughout December 29, 2006, successive waves of  
23 thunderstorms buffeted the Dallas-Fort Worth International Airport.  
24 These thunderstorms greatly impacted the flow of air-traffic to and  
25 from DFW.

26 The Department of Transportation Inspector General described  
27 the events that day as follows:

1 On December 29, 2006, severe weather that generated massive  
2 lightning storms and a tornado warning in the Dallas-Fort  
3 Worth area caused American to cancel, divert, or delay over  
4 1,100 of its 1,600 (69 percent) scheduled flights into DFW,  
5 disrupting holiday travel plans for over 13,000 passengers  
6 system-wide. American diverted 130 flights; 124 flights were  
7 bound for DFW but had to be diverted to 24 nearby airports.  
8 The number of diversions on December 29 ranked as the second  
9 largest in American's history, the first being September 11,  
10 2001.

11 Office of Inspector General Report No. AV-2007-077. These flights  
12 originated from airports in Arizona, California, Colorado, Florida,  
13 Illinois, Indiana, Iowa, Kentucky, Maryland, Mississippi, North  
14 Carolina, Ohio, New Jersey, New York, Virginia and Puerto Rico.  
15 The aircraft were diverted to the following airports: Little Rock  
16 and Northwest Arkansas Regional Airport, Arkansas; Baton Rouge and  
17 Shreveport, Louisiana; Oklahoma City and Tulsa, Oklahoma; Abilene,  
18 Austin, Houston, Longview, Lubbock, Midland, San Antonio and Waco,  
19 Texas; and Nashville and Memphis, Tennessee. The passengers on  
20 these aircraft have mailing addresses in forty-eight states,  
21 several United States territories and twenty foreign countries.  
22

23 Named Plaintiffs Kathleen Hanni, Timothy Hanni, Landen Hanni  
24 and Chase Costello were on one of those diverted planes. Their  
25 flight left San Francisco and was to arrive in Mobile, Alabama,  
26 connecting at Dallas-Fort Worth Airport (DFW). In San Francisco,  
27 the flight was delayed by approximately one hour due to mechanical  
difficulty. Toward the end of the flight to Dallas, the captain  
notified the passengers that bad weather in Dallas prevented the  
plane from landing there. Instead, the plane was diverted to  
Austin to wait for the weather to clear. While on the ground in  
Austin, the flight attendants handed out bags of snacks and served

1 beverages. After the plane was on the ground in Austin for  
2 approximately three or four hours, the pilot announced that a bus  
3 would come to the airplane and allow the elderly, individuals  
4 traveling with small children, the sick, and people whose final  
5 destination was Austin to disembark. After the announcement,  
6 passengers stood up and filled the aisles. Plaintiffs were seated  
7 towards the front of the plane, in row 11, and were not able to get  
8 to the back of the plane where people were disembarking. As a  
9 consequence, Plaintiffs missed the opportunity to leave the plane.

10 While the plane was on the ground in Austin, the bathroom at  
11 the front of the plane smelled of human waste and the toilet was  
12 overflowing. During their last three hours on the plane,  
13 Plaintiffs could smell the stench of the bathroom from their seats.  
14 At some point, Plaintiff Kathleen Hanni told a flight attendant and  
15 the pilot that being confined on the airplane for so long was  
16 triggering a strong emotional response that she related back to an  
17 attack she suffered six months earlier. The pilot offered to  
18 arrange for an ambulance to take her to the terminal, but she  
19 declined because she did not want to separate from her family.  
20 After four more hours of waiting on the plane, the pilot taxied the  
21 aircraft to a gate and Plaintiffs disembarked. In total,  
22 Plaintiffs waited over nine hours on the tarmac in Austin.

23 Defendant handed out hotel vouchers to the passengers of the  
24 flight, but Plaintiffs did not want to wait in the long line for a  
25 voucher and they thought the voucher was only for a ten dollar  
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1 discount.<sup>1</sup> Plaintiffs then waited for their luggage in the baggage  
2 area for three hours, but their luggage never arrived.

3 The next morning, December 30, Plaintiffs took a plane to  
4 Dallas but were not able to board a connecting flight from there to  
5 Mobile because the flight was overweight due to excess baggage.  
6 However, Plaintiffs' bags made it onto the flight. Plaintiffs  
7 spent another night in Dallas and caught a flight to Mobile the  
8 next day, December 31. Plaintiffs picked up their bags in Mobile  
9 when they arrived.

10 The first complaint filed in this case was on behalf of  
11 Kathleen Hanni only. Her complaint included claims for false  
12 imprisonment, intentional infliction of emotional distress,  
13 negligence, breach of contract and intentional misrepresentation.  
14 Defendant moved pursuant to Federal Rules of Civil Procedure 9(b)  
15 and 12(b)(6) to dismiss the complaint. The Court granted the  
16 motion in part and denied it in part, giving Ms. Hanni leave to  
17 file an amended complaint. April 25, 2008 Order. On May 15, 2008,  
18 Ms. Hanni filed her first amended complaint (FAC). She again  
19 alleged claims for false imprisonment, negligence, breach of  
20 contract and fraud, and included additional causes of action for  
21 conversion, civil conspiracy and a claim pursuant to the Racketeer  
22 Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961.  
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24 <sup>1</sup>Plaintiffs cannot remember if an airport official or  
25 Defendant told them that the voucher was for ten dollars. Ms.  
26 Hanni told a Department of Transportation Investigator that "Mr.  
27 [Timothy] Hanni attempted to obtain [a voucher], but decided not to remain in a long line for what was rumored to be a \$10 voucher." Kaus Decl. in Support of Motion to Deny Class Cert., Exh. D at TH000196.

1 Defendant again moved pursuant to Federal Rule of Civil Procedure  
2 12(b)(6) to dismiss the FAC.

3 On July 11, 2008, the Court issued an order granting the  
4 motion in part and denying it in part. The Court dismissed with  
5 prejudice Ms. Hanni's claims for false imprisonment, intentional  
6 infliction of emotional distress and fraud and dismissed her claim  
7 for breach of contract to the extent it was based on paragraphs  
8 three, ten, nineteen or the specified portions of paragraph  
9 eighteen of the Conditions of Carriage (COC). The Court dismissed  
10 without prejudice Ms. Hanni's claims for civil conspiracy and RICO.  
11 July 11, 2008 Order at 6, 16, 19-20. The Court gave Ms. Hanni  
12 leave to file a second amended complaint that could include: (1) a  
13 negligence claim based on Defendant's failure to provide adequate  
14 food, water, restroom facilities and ventilation in violation of  
15 its duties as a common carrier; (2) a breach of contract claim  
16 based on paragraph five of the COC or the portions of paragraph  
17 eighteen of the COC identified in paragraphs 124(e) and (g) of the  
18 FAC; and (3) a conversion claim. The Court also allowed Ms. Hanni  
19 to include a claim for civil conspiracy if, consistent with Rule  
20 11, she could name at least one alleged conspirator as a defendant  
21 and allege facts to support a finding that the individual conspired  
22 with other individuals with unlawful intent. July 11, 2008 Order  
23 at 20.

24 On July 31, 2008, Ms. Hanni filed her second amended complaint  
25 (SAC). On August 12, 2008, the parties stipulated that Ms. Hanni  
26 would file a third amended complaint (TAC) that included Ms.  
27 Hanni's husband, Timothy Hanni, and sons, Chase Costello and Landen  
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1 Hanni, as plaintiffs and that modified the allegations of the  
2 complaint. Stipulation to File an Amended Complaint, August 12,  
3 2008. On August 13, 2008, Plaintiffs filed their TAC alleging  
4 claims for negligence, breach of contract, conversion and civil  
5 conspiracy. TAC, August 13, 2008 ¶ 87-109. The Court dismissed  
6 many of the causes of action in the TAC; however Plaintiffs were  
7 allowed pursue the negligence, breach of contract and conversion  
8 causes of action outlined above. November 21, 2008 Order at 17.

9 On July 10, 2009, in response to discovery orders issued by a  
10 Magistrate Judge compelling the production of Ms. Hanni's medical  
11 records, Kathleen and Landen Hanni moved voluntarily to dismiss  
12 their claims. The Court granted their motion on July 20, 2009.  
13 Thus, Timothy Hanni and Chase Costello remain as Plaintiffs in this  
14 case.<sup>2</sup>

15 In sum, Plaintiffs represent classes of passengers who allege  
16 that, after their flights were diverted, they were confined to  
17 their respective aircraft for a period of two to twelve hours.  
18 They allege that, during this time, Defendant did not provide  
19 passengers with adequate food, hydration, ventilation or properly  
20 working toilets. They allege that Defendant purposefully confined  
21 passengers for extended lengths of time to prevent costly  
22 "passenger migration" to other airlines or modes of transportation.  
23 Plaintiffs allege that airlines prevent "passenger migration" by  
24 holding an aircraft on the tarmac, which (1) prohibits passengers  
25 from exiting so that the airline may avoid obligations and expenses

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26  
27 <sup>2</sup>Hereinafter, Timothy Hanni and Chase Costello will be  
referred to as Plaintiffs unless otherwise specified.

1 associated with mass flight delays and cancellations and  
2 (2) prevents passengers from obtaining alternate transportation.

3 Plaintiffs also claim that Defendant withheld their baggage  
4 and failed to provide or fully reimburse them for overnight  
5 lodging, meals, ground transportation, telephone and other  
6 passenger expenses incurred due to the events of December 29, 2006.

7 Plaintiffs now seek certification pursuant to Rule 23(b)(3) to  
8 represent the following classes:

9 Breach of Contract Class: All domestic travelers who traveled  
10 on an American Airlines flight scheduled to land at DFW on  
11 December 29, 2006, that was diverted to another airport, who  
12 did not reach his/her final destination on the scheduled date  
13 of arrival, and who incurred unreimbursed out-of-pocket  
14 expenses as a result of the delay;

15 Negligence Class: All domestic travelers who traveled on an  
16 American Airlines flight scheduled to land at DFW on December  
17 29, 2006, that was diverted to another airport, and whose  
18 flight was stranded on the tarmac for a period of hours; and

19 Conversion Class: All domestic travelers who traveled on an  
20 American Airlines flight scheduled to land at DFW on December  
21 29, 2006, that was diverted to another airport, who did not  
22 reach his/her final destination on the scheduled date of  
23 arrival, and whose luggage was not returned to him/her on  
24 December 29, 2006.

25 If the Court declines to certify one or more of the above-  
26 proposed classes, Plaintiffs seek certification pursuant to Rule  
27 23(b)(2) to represent the following class:

28 Declaratory/Injunctive Relief Class: All domestic travelers  
29 who traveled on an American Airlines flight scheduled to land  
30 at DFW on December 29, 2006, that was diverted to another  
31 airport, whose flight was stranded on the tarmac for a period  
32 of hours, and who were not provided with the essential needs  
33 identified in Section 19 of the Conditions of Carriage  
34 contract.

35 Excluded from the proposed classes are Defendant, any entity  
36 or division in which Defendant has a controlling interest, and its  
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1 legal representatives, officers, directors, assigns and successors,  
2 as well as the judges to whom this case is assigned and any member  
3 of the judges' immediate families. Plaintiffs seek the appointment  
4 of Timothy Hanni and Colleen O'Connor as class representatives.  
5 Law Offices of Paul S. Hudson, P.C. and Andrus Anderson, LLP seek  
6 appointment as class counsel.

7 DISCUSSION

8 I. Intervention

9 Before Plaintiffs moved for class certification, Colleen  
10 O'Connor moved to intervene as a plaintiff in this action as of  
11 right under Federal Rule of Civil Procedure 24(a)(2), or, in the  
12 alternative, permissively under Federal Rule of Civil Procedure  
13 24(b)(2).

14 To intervene as a matter of right under Federal Rule of Civil  
15 Procedure 24(a)(2), "an applicant must claim an interest the  
16 protection of which may, as a practical matter, be impaired or  
17 impeded if the lawsuit proceeds without" the applicant. Forest  
18 Conservation Council v. United States Forest Serv., 66 F.3d 1489,  
19 1493 (9th Cir. 1995). The Ninth Circuit applies a four-part test  
20 to motions under Rule 24(a). An applicant seeking intervention as  
21 of right must show that:

22 (1) it has a significant protectable interest relating to the  
23 property or transaction that is the subject of the action;  
24 (2) the disposition of the action may, as a practical matter,  
impair or impede the applicant's ability to protect its  
interest; (3) the application is timely; and (4) the existing  
parties may not adequately represent the applicant's interest.

25 Donnelly v. Glickman, 159 F.3d 405, 409 (9th Cir. 1998) (citing  
26 Cabazon Band of Mission Indians v. Wilson, 124 F.3d 1050, 1061 (9th

1 Cir. 1997), cert. denied, 524 U.S. 926 (1998)).

2 The Ninth Circuit interprets Rule 24(a) broadly in favor of  
3 intervention. Id. In evaluating a motion to intervene under Rule  
4 24(a), a district court is required "to take all well-pleaded,  
5 nonconclusory allegations in the motion . . . as true absent sham,  
6 frivolity or other objections." Southwest Ctr. for Biological  
7 Diversity v. Berg, 268 F.3d 810, 820 (9th Cir. 2001).

8 A court may also at its discretion permit intervention "when  
9 an applicant's claim or defense and the main action have a question  
10 of law or fact in common." Fed. R. Civ. P. 24(b)(2). In  
11 exercising its discretion, a court is to "consider whether the  
12 intervention will unduly delay or prejudice the adjudication of the  
13 rights of the original parties." Id.

14 A. Intervention as of Right

15 1. Timeliness

16 The most important consideration in evaluating the timeliness  
17 of a motion to intervene is whether any delay in moving for  
18 intervention may prejudice existing parties; as long as prejudice  
19 is not likely to result from the timing of the motion, courts  
20 interpret the timeliness requirement liberally. See, e.g.,  
21 Cummings v. United States, 704 F.2d 437, 439 (9th Cir. 1983)  
22 (motion to intervene timely even though made after interrogatories  
23 and two weeks before date set for close of discovery). The Court  
24 considers three factors in evaluating whether a motion to intervene  
25 is timely: "(1) the stage of the proceeding at which an applicant  
26 seeks to intervene; (2) the prejudice to other parties; and (3) the  
27 reason for and length of the delay." California Dep't of Toxic

1     Substances Control v. Commercial Realty Projects, Inc., 309 F.3d  
2     1113, 1119 (9th Cir. 2002) (quoting United States v. State of  
3     Washington, 86 F.3d 1499, 1503 (9th Cir. 1996)).

4              Defendant argues that the motion to intervene is untimely,  
5     based on the length of time between the original complaint and the  
6     instant motion. As Defendant notes, over seventeen months have  
7     passed since the filing of the original complaint and this  
8     intervention motion. However, this fact alone is not dispositive.  
9     In analyzing timeliness, the "focus is on the date the person  
10   attempting to intervene should have been aware his 'interest[s]'  
11   would no longer be protected adequately by the parties,' rather  
12   than the date the person learned of the litigation." Officers for  
13   Justice v. Civil Serv. Comm'n of the City and County of San  
14   Francisco, 934 F.2d 1092, 1095 (9th Cir. 1991) (quoting Legal Aid  
15   Soc'y v. Dunlop, 618 F.2d 48, 50 (9th Cir. 1980)). Here, O'Connor  
16   claims to have learned of the present litigation only when she  
17   received a letter dated April 9, 2009 from Plaintiffs' attorneys  
18   notifying her about the lawsuit. Moreover, O'Connor moved to  
19   intervene within two days after Kathleen Hanni filed her motion to  
20   withdraw from the case.

21              However, the matter is no longer in the early stages of its  
22   life-cycle. In this order the Court rules on the parties' summary  
23   judgment motions and determines class certification. Moreover,  
24   fact discovery for class certification has closed.

25              Defendant would be prejudiced by the intervention of O'Connor  
26   because she seeks to add three new causes of action to the case.  
27   The deadline to add new claims or parties was April 16, 2009.

1 O'Connor asserts that any additional discovery required by these  
2 claims will be minimal because they arise out of the same events  
3 and conduct as those alleged in the TAC. While O'Connor's claims  
4 indeed arise from the events on December 29, 2006, they concern  
5 several significantly different factual allegations. These new  
6 allegations would require Defendant to depose many new witnesses.  
7 The purpose of intervention is to allow outsiders with an interest  
8 in a lawsuit to come in as a party, not to allow an outsider to  
9 side-step discovery rules and deadlines in order to assert new  
10 claims and facts.

11 For these reasons, the Court finds the motion to intervene is  
12 untimely.

## 2. Protectable Interests and Impairment of Ability to Protect Interests

As noted above, under Rule 24(a)(2), an applicant may intervene as of right when the applicant "claims an interest relating to the property or transaction which is the subject of the action." The interest asserted need not be a "specific legal or equitable interest," but it must be "significantly protectable." Portland Audubon Soc'y v. Hodel, 866 F.2d 302, 309 (9th Cir. 1989), cert. denied, 492 U.S. 911 (1989) (citations omitted). Applicants must also be situated such that "disposition of the action may as a practical matter impair or impede the applicant's ability to protect" its asserted interests. Forest Conservation Council, 66 F.3d at 1493.

Interests the Ninth Circuit has held sufficient to support intervention as of right include a city's interest in preventing

1 modification of water permits held under the Clean Water Act,  
2 Sierra Club, 995 F.2d at 1482; a state's interest in preventing  
3 action on federal lands that could impair the state's legal duty to  
4 manage its own adjacent lands, Forest Conservation Council, 66 F.3d  
5 at 1497; a power company's interest in preventing federal action  
6 that could hinder construction of a power plant and the company's  
7 duty to ensure a water supply, Churchill County v. Babbitt, 150  
8 F.3d 1072, 1084 (9th Cir. 1998), as amended by 158 F.3d 491 (9th  
9 Cir. 1998); and a city's interests in taxing and regulating  
10 contested land, Scotts Valley Band of Pomo Indians of Sugar Bowl  
11 Rancheria v. United States, 921 F.2d 924, 927-28 (9th Cir. 1990).  
12 In contrast, the Ninth Circuit has held that timber companies'  
13 economic interest in ensuring an ongoing supply of timber was not a  
14 "protectable" interest sufficient for intervention as of right when  
15 those companies did not assert existing contracts for the timber in  
16 question. Portland Audubon, 866 F.2d at 309; see also Sierra Club,  
17 995 F.2d at 1482.

18 O'Connor asserts that her interest in this action is that her  
19 "experiences and claims are nearly identical to those alleged in  
20 the Hanni Third Amended Complaint." Motion at 7. She claims that  
21 her ability to protect her interests will be impaired because,  
22 without her presence, there would not be a class representative.  
23 Without a class representative, the class action may not be  
24 certified and litigation of these claims individually would be  
25 "highly inefficient and waste judicial resources." Id. However,  
26 O'Connor's fear that the Court will decline to certify the class  
27 but for intervention of a new proposed class representative is

1 unfounded. Timothy Hanni and Chase Costello remain as Plaintiffs  
2 in the case and Plaintiffs have proposed that Timothy Hanni serve  
3 as the class representative. The Court addresses the question of a  
4 class representative when it considers the motion for class  
5 certification below. Accordingly, the Court concludes that  
6 O'Connor's protectable interests will not be impaired.

7 Therefore, O'Connor's motion to intervene as of right is  
8 denied.

9       B. Permissive Intervention

10      As for permissive intervention, the Court declines to exercise  
11 its discretion to permit O'Connor to intervene in the case. As  
12 noted above, O'Connor seeks to add new claims and make her  
13 complaint the operative pleading in the case. Her intervention  
14 would require additional discovery which would push back deadlines  
15 and delay the resolution of this case. Judicial economy would  
16 suffer with the addition of O'Connor's new claims and issues.

17     II. Class Certification

18      Plaintiffs move for class certification proposing Timothy  
19 Hanni and Colleen O'Connor as class representatives. Although the  
20 Court denies O'Connor's motion to intervene, Plaintiffs did not  
21 have the benefit of the Court's ruling on that motion before filing  
22 their motion for class certification. Nevertheless, in the  
23 interest of judicial economy, the Court will address the merits of  
24 both O'Connor and Timothy Hanni as class representatives.

25      Plaintiffs seeking to represent a class must satisfy the  
26 threshold requirements of Rule 23(a) as well as the requirements  
27 for certification under one of the subsections of Rule 23(b). Rule  
28

1 23(a) provides that a case is appropriate for certification as a  
2 class action if: "(1) the class is so numerous that joinder of all  
3 members is impracticable; (2) there are questions of law or fact  
4 common to the class; (3) the claims or defenses of the  
5 representative parties are typical of the claims or defenses of the  
6 class; and (4) the representative parties will fairly and  
7 adequately protect the interests of the class." Fed. R. Civ. P.  
8 23(a). Rule 23(b) further provides that a case may be certified as  
9 a class action only if one of the following is true:

10 (1) prosecuting separate actions by or against individual  
11 class members would create a risk of:

12 (A) inconsistent or varying adjudications with  
13 respect to individual class members that would  
establish incompatible standards of conduct for the  
party opposing the class; or

14 (B) adjudications with respect to individual class  
15 members that, as a practical matter, would be  
dispositive of the interests of the other members  
not parties to the individual adjudications or would  
substantially impair or impede their ability to  
protect their interests;

16 (2) the party opposing the class has acted or refused to  
17 act on grounds that apply generally to the class, so that  
final injunctive relief or corresponding declaratory  
relief is appropriate respecting the class as a whole; or

18 (3) the court finds that the questions of law or fact  
19 common to class members predominate over any questions  
affecting only individual members, and that a class  
action is superior to other available methods for fairly  
and efficiently adjudicating the controversy. The  
matters pertinent to these findings include:

20 (A) the class members' interests in individually  
21 controlling the prosecution or defense of separate  
actions;

22 (B) the extent and nature of any litigation  
23 concerning the controversy already begun by or  
against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b).

Plaintiffs seeking class certification bear the burden of demonstrating that each element of Rule 23 is satisfied, and a district court may certify a class only if it determines that the plaintiffs have borne their burden. General Tel. Co. v. Falcon, 457 U.S. 147, 158-61 (1982); Doninger v. Pac. Nw. Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977). In making this determination, the court may not consider the merits of the plaintiffs' claims. Burkhalter Travel Agency v. MacFarms Int'l, Inc., 141 F.R.D. 144, 152 (N.D. Cal. 1991). Rather, the court must take the substantive allegations of the complaint as true. Blackie v. Barrack, 524 F.2d 891, 901 (9th Cir. 1975). Nevertheless, the court need not accept conclusory or generic allegations regarding the suitability of the litigation for resolution through a class action. Burkhalter, 141 F.R.D. at 152. In addition, the court may consider supplemental evidentiary submissions of the parties. In re Methionine Antitrust Litiq., 204 F.R.D. 161, 163 (N.D. Cal. 2001); see also Moore v. Hughes Helicopters, Inc., 708 F.2d 475, 480 (9th Cir. 1983) (noting that "some inquiry into the substance of a case may be necessary to ascertain satisfaction of the commonality and typicality requirements of Rule 23(a);") however, "it is improper to advance a decision on the merits at the class certification stage"). Ultimately, it is in the district court's discretion whether a

1 class should be certified. Burkhalter, 141 F.R.D. at 152.

2 As a preliminary matter, Defendant does not dispute  
3 Plaintiffs' assertion that this action satisfies the numerosity  
4 requirement of Rule 23(a)(1), and the Court finds that it does.  
5 See 1 Alba Cone & Herbert B. Newberg, Newberg on Class Actions  
6 § 3.3 (4th ed. 2002) (where "the exact size of the class is  
7 unknown, but general knowledge and common sense indicate that it is  
8 large, the numerosity requirement is satisfied").

9 Defendant asserts that class certification must fail because  
10 (1) Plaintiffs cannot meet the commonality and typicality  
11 requirements of Rule 23(a)(2) and (3); (2) Plaintiffs cannot  
12 protect the interests of all class members as required by Rule  
13 23(a)(4); and (3) Plaintiffs cannot meet the requirements of Rule  
14 23(b). The Court addresses each argument in turn.

15 A. Class Definition

16 "[I]n order to maintain a class action, the class sought to be  
17 represented must be adequately defined and clearly ascertainable."  
18 DeBremaeker v. Short, 433 F.2d 733, 734 (5th Cir. 1970) (citing  
19 Weisman v. MCA Inc., 45 F.R.D. 258 (D. Del. 1968)). "A class is  
20 ascertainable if it identifies a group of unnamed plaintiffs by  
21 describing a set of common characteristics sufficient to allow a  
22 member of that group to identify himself or herself as having a  
23 right to recover based on the description." Moreno v. Autozone,  
24 Inc., 251 F.R.D. 417, 421 (N.D. Cal. 2008) (quoting Bartold v.  
25 Glendale Federal Bank, 81 Cal. App. 4th 816, 828 (2000). "A class  
26 definition is inadequate if a court must make a determination of  
27 the merits of the individual claims to determine whether a person

1 is a member of the class." 5 James W. Moore, Moore's Federal  
2 Practice § 23.21[3][c] (2001).

3 Defendant claims that Plaintiffs have failed to propose a  
4 proper class definition in that each of the proposed definitions  
5 would require one or more individualized fact-finding proceeding,  
6 per passenger, merely to determine whether that passenger is in the  
7 proposed class. Plaintiffs note that the breach of contract class  
8 "consists of passengers whose claims for damages arise from  
9 Defendant's failure to provide or fully reimburse them for  
10 reasonable overnight accommodations, including meals, lodging and  
11 transportation." Plaintiffs' Motion at 8. Under that definition,  
12 the Court, before ascertaining whether a passenger is in this  
13 proposed class, would have to take evidence from each prospective  
14 class member as to (1) whether that passenger incurred "out of  
15 pocket expenses" that (2) resulted from the "delay," (3) what those  
16 expenses were, (4) whether the expenses were "reasonable,"  
17 (5) whether that passenger made a demand on Defendant to defray or  
18 reimburse the expenses, (6) whether Defendant did defray or  
19 reimburse those expenses, and (7) whether Defendant's defrayment or  
20 reimbursement was "full." A class that is dependant on so many  
21 individualized variables is not sufficiently ascertainable.

22 Similarly, Plaintiffs' negligence class is not clearly  
23 ascertainable. Plaintiffs note that the negligence class "consists  
24 of passengers who suffered injury as a consequence of Defendant's  
25 negligent failure to provide adequate food, water, restrooms and  
26 ventilation during their confinement on December 29, 2006."  
27 Plaintiffs' Motion at 8. Under this definition, the Court would

1 have to determine first which proposed class members have injuries  
2 before proceeding with the case. Plaintiffs argue that Defendant  
3 bears the burden to proffer evidence that "some of the members of  
4 the proposed Class suffered no injury or enjoyed their hours-long  
5 confinement." Reply at 4. However, it is Plaintiffs who bear the  
6 burden to show that all class members suffered an injury. See  
7 General Tel. Co., 457 U.S. at 158-61.

8 Moreover, the negligence class is also defined vaguely. The  
9 amorphous concept of Defendant's failure to provide "adequate"  
10 food, water, restrooms and ventilation will vary from passenger to  
11 passenger and aircraft to aircraft. See, e.g., 5 Moore's Federal  
12 Practice § 23.21[3][c] ("[T]he class could not be determined in  
13 terms of whether its members were treated 'properly,' 'adequately,'  
14 'reasonably,' or 'constitutionally,' because then class membership  
15 depends on a determination of the merits as to each potential class  
16 member."). Further, the phrase, "for a period of hours," is  
17 equally vague. This definition presumably includes any time period  
18 two hours and above. Individuals in an aircraft sitting on the  
19 tarmac for two hours did not necessarily suffer the same types of  
20 injuries as individuals in an aircraft sitting on the tarmac for  
21 ten hours. These groups of individuals should not be in a class  
22 together.

23 Plaintiffs' conversion class does not suffer from the same  
24 faults as the breach of contract and negligence classes. Those  
25 class members can easily discern whether their bags were returned  
26 to them on December 29, 2006. See Moreno, 251 F.R.D. at 421.  
27

1           C. Class Certification: Commonality

2           "A class has sufficient commonality 'if there are questions of  
3 fact and law which are common to the class.'" Hanlon v. Chrysler  
4 Corp., 150 F.3d 1011, 1019 (9th Cir. 1998) (quoting Fed. R. Civ. P.  
5 23(a)(2)). "All questions of fact and law need not be common to  
6 satisfy this rule. The existence of shared legal issues with  
7 divergent factual predicates is sufficient, as is a common core of  
8 salient facts coupled with disparate legal remedies within the  
9 class." Id. Thus, the fact that class members have suffered  
10 different degrees of injury and damages will not preclude a finding  
11 of commonality. Blackie v. Barrack, 524 F.2d 891, 905 (9th Cir.  
12 1975).

13           Here, all of Plaintiffs' claims emanate from the grounding of  
14 flights on December 29, 2006. The decision to hold flights on the  
15 tarmac was made by Defendant's System Operations Control Center at  
16 DFW, which is the "nerve center of the worldwide American Airlines  
17 route network, coordinating the day-to-day, minute-by-minute  
18 operation of the airline . . . [where] decisions on a centralized,  
19 system-wide basis" are made. Anderson Decl., Exh. D at 2-3; see  
20 also Anderson Reply Decl. Ex. A at AA 000472. However, while it is  
21 true that Defendant's decision to keep aircraft on the tarmac  
22 affected all class members in some way, it did not affect each  
23 class member similarly. Some class members were grounded for ten  
24 hours, while others were waiting for two hours; some class members  
25 complained of a lack of food and water, while others saw the  
26 experience as a mere inconvenience. Class members' varied  
27 experiences of sitting on a tarmac during a storm are not

1 sufficiently "common" to fulfill Rule 23(a)(2)'s commonality  
2 requirement with respect to the negligence claim. Moreover, the  
3 manner in which Defendant returned proposed class members' luggage  
4 and reimbursed them for overnight accommodations is similarly too  
5 varied to satisfy Rule 23(a)(2) with respect to the breach of  
6 contract and conversion claims.

7       D. Class Certification: Typicality

8       The typicality prerequisite of Rule 23(a) is fulfilled if "the  
9 claims or defenses of the representative parties are typical of the  
10 claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). The  
11 test for typicality is "whether other members have the same or  
12 similar injury, whether the action is based on conduct which is not  
13 unique to the named plaintiffs, and whether other class members  
14 have been injured by the same course of conduct." Hanon v.  
15 Dataproducts Corp., 976 F.2d 497, 508 (9th Cir. 1992) (quoting  
16 Schwartz v. Harp, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). "Under  
17 the rule's permissive standards, representative claims are  
18 'typical' if they are reasonably co-extensive with those of absent  
19 class members; they need not be substantially identical." Hanlon,  
20 150 F.3d at 1020.

21       Here, it is not clear whether representative Plaintiffs'  
22 claims are typical of the claims of the class members. Mr. Hanni,  
23 one of the proposed class representatives, testified that he  
24 suffered no physical or emotional injuries from his experience on  
25 the aircraft. The other proposed representative, Colleen O'Connor,  
26 claims to have suffered hunger, thirst and exhaustion during her  
27 confinement, but it is not clear that she suffered any physical or

1 emotional injuries. As discussed below, without any claim of an  
2 injury, the negligence claims of Plaintiffs' proposed class  
3 representatives cannot survive.

4 As to the breach of contract claim, Mr. Hanni did not stand in  
5 line to request a hotel voucher on December 29, and he did not  
6 provide any receipts to Defendant when he requested reimbursement  
7 for a hotel charge. Ms. O'Connor received a hotel voucher. These  
8 circumstances are not typical of class members who made claims for  
9 unreimbursed out-of-pocket expenses.

10 E. Class Certification: Adequate Representation

11 Rule 23(a)(4) requires that "the representative parties will  
12 fairly and adequately protect the interests of the class." Fed. R.  
13 Civ. P. 23(a)(4). The adequacy requirement consists of two  
14 inquiries: "(1) do the representative plaintiffs and their counsel  
15 have any conflicts of interest with other class members, and  
16 (2) will the representative plaintiffs and their counsel prosecute  
17 the action vigorously on behalf of the class?" Staton v. Boeing  
18 Co., 327 F.3d 938, 958 (9th Cir. 2003).

19 Nothing in the record shows that Mr. Hanni and Ms. O'Connor  
20 and their counsel have any conflicts of interest with other class  
21 members. However, they will not be able to prosecute the action  
22 vigorously because, as noted above, their claims are not typical of  
23 all the class members' claims. Therefore, Plaintiffs have not  
24 satisfied Rule 23(a)(4).

25 F. Class Certification: Predominance

26 Plaintiffs assert that this action falls under the ambit of  
27 Rule 23(b) because common issues will predominate over any

1 individualized issues and because a class action is the superior  
2 method of adjudicating this matter. "The Rule 23(b)(3)  
3 predominance inquiry tests whether proposed classes are  
4 sufficiently cohesive to warrant adjudication by representation."  
5 Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623 (1997). "When  
6 common questions present a significant aspect of the case and they  
7 can be resolved for all members of the class in a single  
8 adjudication, there is clear justification for handling the dispute  
9 on a representative rather than an individual basis." Hanlon, 150  
10 F.3d at 1022 (internal quotation marks omitted).

11 To determine whether the predominance requirement is  
12 satisfied, "courts must identify the issues involved in the case  
13 and determine which are subject to 'generalized proof,' and which  
14 must be the subject of individualized proof." In re Dynamic Random  
15 Access Memory (DRAM) Antitrust Litiq., 2006 WL 1530166, at \*6 (N.D.  
16 Cal.).

17 There are individualized issues about what happened on  
18 December 29th from diversion airport to airport, from aircraft to  
19 aircraft, and from person to person. For instance, the amount of  
20 food on each aircraft differed depending on an aircraft's estimated  
21 travel time to its next destination. Short commuter flights from  
22 Dallas stocked less food than flights to coastal cities. Further,  
23 some aircraft were permitted to dock during their delay whereas  
24 others waited on the tarmac. Some passengers on aircraft on the  
25 tarmac were removed from the aircraft and transported by bus to the  
26 terminal whereas others stayed on the aircraft during the entirety  
27 of the delay.

1        Specifically as to the negligence claim, Mr. Hanni noted that  
2 everybody on his plane was affected differently by the delay. T.  
3 Hanni Depo. at 53-54. He observed that some people were sanguine  
4 and dealt with it better than others. Id. Further, Plaintiffs  
5 cannot prove, through generalized evidence, that each member of the  
6 class suffered an actual injury proximately caused by Defendant's  
7 breach of a legal duty. Mr. Hanni testified that he himself did  
8 not suffer any physical or mental harm from the incident.  
9 Similarly, Andrew Welch, another passenger on the same plane as Mr.  
10 Hanni, testified that neither he nor his wife suffered any physical  
11 illness from the events. Kaus Decl., Exh. C at 43:16-21. Thus,  
12 the Court concludes that common issues do not predominate with  
13 respect to Plaintiffs' negligence claim.

14        Similarly, each passenger's breach of contract claim will be  
15 highly dependant on the individual facts pertaining to his or her  
16 experiences. Individual class members plan to sue for breach of  
17 contract under various sections of Defendant's Conditions of  
18 Carriage (COC). For example, Mr. Hanni claims a breach of the  
19 "bumping" provision of the COC because he claims that he had a  
20 reserved seat on a December 30th flight to Mobile, but was not  
21 allowed to board. Ms. O'Connor does not make a bumping claim.  
22 Rather, she claims that Defendant failed to provide her with  
23 "reasonable overnight accommodations," because, although she  
24 received a hotel voucher, she was not separately reimbursed for  
25 out-of-pocket expenses. Each individual claim by class members  
26 will turn on a variety of clauses within the COC. Specific facts  
27 pertaining to each individual class member and his or her

1 experiences with respect to breaches of various provisions of the  
2 COC predominate with respect to the contract claim.

3 Individual questions also predominate in Plaintiffs' proposed  
4 conversion class. Plaintiffs have not carried their burden to show  
5 that there will be generalized proof of whether each class member  
6 checked baggage, received baggage at the diversion airport, or even  
7 made a demand for return of his or her baggage that Defendant  
8 refused.

9 G. Superiority

10 Rule 23(b)(3) also requires that class resolution must be  
11 "superior to other available methods for the fair and efficient  
12 adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). "The  
13 policy at the very core of the class action mechanism is to  
14 overcome the problem that small recoveries do not provide the  
15 incentive for any individual to bring a solo action prosecuting his  
16 or her rights." Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617  
17 (1997). However, if "each class member has to litigate numerous  
18 and substantial separate issues to establish his or her right to  
19 recover individually, a class action is not 'superior.'" Zinser v.  
20 Accufix Research Institute, Inc., 253 F.3d 1180, 1192 (2001). The  
21 complexities of this class action weigh heavily against class  
22 certification. The evidence suggests that there are just too many  
23 individual issues for the Court to manage for class adjudication to  
24 be deemed superior.

25 H. Rule 23(b)(2)

26 Plaintiffs request in the alternative that the Court certify a  
27 class pursuant to Rule 23(b)(2) for the claims arising from

1 Defendant's breach of the Conditions of Carriage contract clause  
2 guaranteeing, "In the case of extraordinary events that result in  
3 very lengthy onboard delays, American Airlines and American Eagle  
4 will make every reasonable effort to ensure that essential needs of  
5 food (snack bar such as Nutri-Grain®), water, restroom facilities  
6 and basic medical assistance are met." Because the Court concludes  
7 that Plaintiffs have failed to meet the requirements of Rule 23(a),  
8 their request to certify a class under Rule 23(b)(2) also fails.

9 In sum, the Court concludes that Plaintiffs' claims are not  
10 appropriate for determination on a class-wide basis. The Court  
11 GRANTS Defendant's motion to deny class certification and DENIES  
12 Plaintiffs' motion for class certification.<sup>3</sup>

13 II. Summary Judgment Motions

14 Defendant has moved for summary judgment on all of Plaintiffs'  
15 claims and Plaintiffs have moved for summary judgment on the breach  
16 of contract claim. Although the parties dispute whether Texas or  
17 California law governs this case, neither party has argued that the  
18 law of the two states conflicts with respect to any of the  
19 underlying causes of action in any way relevant to a decision on  
20 these motions. Therefore, the Court will apply California law.

21 A. Negligence Claim

22 Plaintiffs allege that Defendant negligently failed to provide  
23 adequate food, water, restroom facilities and ventilation in  
24 violation of its duties as a common carrier. Defendant counters  
25

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26 <sup>3</sup>Because the Court denies certification on the above-mentioned  
27 grounds, it need not determine whether Plaintiffs' choice of law  
proposal would violate due process.

1 that it owes no duty to Plaintiffs apart from the contractual  
2 provisions of its COC. The COC states that Defendant will provide  
3 food, water and other basic necessities in the case of  
4 extraordinary events that result in very lengthy onboard delays.  
5 COC, ¶ 19.

6 Under California law, "conduct amounting to a breach of  
7 contract becomes tortious only when it also violates a duty  
8 independent of the contract arising from principles of tort law."  
9 Erlich v. Menezes, 21 Cal. 4th 543, 552 (1999). Here, as a common  
10 carrier, Defendant owes Plaintiffs "both a duty of utmost care and  
11 the vigilance of a very cautious person towards [its] passengers."  
12 Acosta v. Southern Cal. Rapid Transit Dist., 2 Cal. 3d 19, 27  
13 (1970); see Cal. Civ. Code § 2100 ("a carrier of persons for reward  
14 must use the utmost care and diligence for safe carriage, to  
15 provide everything necessary for that purpose, and to exercise to  
16 that end a reasonable degree of skill"). Although Defendant is  
17 "responsible for any, even the slightest, negligence and [is]  
18 required to do all that human care, vigilance, and foresight  
19 reasonably can do under all the circumstances," Acosta, 2 Cal. 3d  
20 at 27, it is not an insurer of its passengers' safety, Lopez v.  
21 Southern Cal. Rapid Transit Dist., 40 Cal. 3d 780, 785 (1985).  
22 "[T]he degree of care and diligence which [it] must exercise is  
23 only such as can reasonably be exercised consistent with the  
24 character and mode of conveyance adopted and the practical  
25 operation of [its] business . . . ." Lopez, 40 Cal. 3d at 785.  
26 Thus, as a common carrier, Defendant may be liable for "failure to  
27 act affirmatively to prevent harm." Ingham v. Luxor Cab Co.,

1 93 Cal. App. 4th 1045, 1050 (2001).

2 Defendant argues that Plaintiffs' negligence claim fails  
3 because, while it has a duty to exercise care for their safety,  
4 Defendant does not have a duty to provide passengers with food,  
5 drink, operational lavatory services and fresh air. Defendant  
6 characterizes Plaintiffs' negligence claim as asking for a "legal  
7 requirement that a common carrier ensure that passengers never  
8 suffer discomfort or inconvenience." Motion at 10.

9 However, Plaintiffs' negligence claim fails for a different  
10 reason. Plaintiffs have not suffered any physical injuries and it  
11 is not even clear that they suffered emotional injuries. Without  
12 evidence of physical injuries, an individual may sue under  
13 negligence with emotional injuries in very limited circumstances.

14 See Burgess v. Superior Court of Los Angeles County, 2 Cal. 4th  
15 1064, 1077 (1992) (defendant doctor liable for "damages for  
16 emotional distress suffered by mothers whose children were harmed  
17 or died as a result of obstetrical malpractice"); Molien v. Kaiser  
18 Foundation Hospitals, 27 Cal. 3d 916, 933 (1980) ("severe"  
19 emotional injury from an erroneous diagnosis of syphilis).  
20 Plaintiffs have not presented evidence that they have suffered such  
21 an emotional injury. The only individual that arguably may have  
22 suffered such a severe emotional injury, Kathleen Hanni, is no  
23 longer a plaintiff in this case.

24 Plaintiffs cite many cases for the proposition that similarly  
25 situated plaintiffs have "recovered damages for 'inconvenience' and  
26 'mental' or 'emotional distress' without physical harm."  
27 Opposition at 12. However, none of the cases Plaintiffs cite

1 actually stands for this proposition. Ingham v. Luxor Cab Co., 93  
2 Cal. App. 4th 1045 (plaintiff suffered hip and knee injury after  
3 walking away from cab); McGettigan v. Bay Area Rapid Transit Dist.,  
4 57 Cal. App. 4th 1011 (1979) (plaintiff physically injured on train  
5 platform after exiting train); Lopez, 40 Cal. 3d 780 (plaintiff  
6 physically injured from fight on bus); Tameny v. Atlantic Richfield  
7 Co., 27 Cal. 3d 167 (1980) (not a common carrier case); J'Aire  
8 Corp. v. Gregory, 24 Cal. 3d 799 (1979) (not a common carrier  
9 case); Lathigra v. British Airways PLC, 41 F. 3d 535, 538 (9th Cir.  
10 1994) (no discussion of whether plaintiff can bring negligence  
11 claim without asserting physical injuries); Rogers v. American  
12 Airlines, 192 F. Supp. 2d 661, 665 (N.D. Tex. 2001) (same);  
13 Chendrimada v. Air India, 802 F. Supp. 1089 (S.D.N.Y. 1992) (same);  
14 Sassouni v. Olympic Airways, 769 F. Supp. 537, 539-40 (S.D.N.Y.  
15 1991) (same); Kupferman v. Pakistan Int'l. Airlines, 438 N.Y.S. 2d  
16 189 (Civ. Ct. 1981) (same). Because Plaintiffs did not suffer any  
17 physical damages, the Court grants summary judgment against  
18 Plaintiffs on the negligence claim.

19 III. Conversion

20 Conversion is the wrongful exercise of dominion over personal  
21 property of another. Farmers Ins. Exchange v. Zerin, 53 Cal. App.  
22 4th 445, 451 (1997). The elements of a conversion are (1) the  
23 plaintiff's ownership or right to possession of the property at the  
24 time of the conversion, (2) the defendant's conversion by a  
25 wrongful act or disposition of property rights and (3) damages.  
26 Id. "To establish a conversion, it is incumbent upon the plaintiff  
27 to show an intention or purpose to convert the goods and to

1 exercise ownership over them, or to prevent the owner from taking  
2 possession of the property." Zaslow v. Kroenert, 29 Cal. 2d 541,  
3 550 (1946). The "act of removing personal property from one place  
4 to another, without an assertion of ownership or preventing the  
5 owner from exercising all rights of ownership in such personal  
6 property, is not enough to constitute a conversion." Itano v.  
7 Colonial Yacht Anchorage, 267 Cal. App. 2d 84, 89 (1968). Further,  
8 a "common carrier incurs no liability for conversion in receiving  
9 and forwarding goods tendered in the usual course of business."  
10 Simonian v. Patterson, 27 Cal. App. 4th 773, 782 (1994).

11 Here, Defendant did nothing more than move Plaintiffs'  
12 personal property from their point of origin to their destination.  
13 At no point did Defendant exercise dominion, assert ownership, or  
14 prevent Plaintiffs from asserting ownership of their luggage.  
15 Plaintiffs have not presented any evidence to the contrary.  
16 Therefore, the Court grants Defendant summary judgment against  
17 Plaintiffs on the conversion claim.

18 IV. Breach of Contract for Denied Boarding Compensation

19 Plaintiffs assert a breach of contract claim under paragraph  
20 five of the Conditions of Carriage (COC). That paragraph provides:

21 If a flight is oversold (more passengers hold confirmed  
22 reservations than there are seats available), and you are  
23 denied boarding involuntarily at the airport, you will be  
entitled to a payment of Denied Boarding Compensation from  
American . . . .

24 Defendant argues that Plaintiffs have no breach of contract claim  
25 under this provision because they were not confirmed passengers on  
26 the flight from Dallas to Mobile on December 30. Defendant relies  
27 on the passenger name record (PNR), which is a regularly updated

1 document that Defendant maintains for each flight and which  
2 includes the travel itinerary for each passenger. The PNR for the  
3 flight in question did not include Plaintiffs' names. Moreover,  
4 nothing in Plaintiffs' depositions supports their allegation that  
5 they had a reservation for the flight on December 30. At most,  
6 Plaintiff Timothy Hanni noted that "to the best of my recollection,  
7 we were un-ticketed, but to go standby for that [flight] to see if  
8 we could get on it." Decl. Stephen Kaus, Exh. B at 74. Mr. Hanni  
9 could not "recall if we were re-ticketed or not, or if we were just  
10 using the ticket from the [] previous day's flight." Id. at 75.  
11 However, in a declaration filed along with Plaintiffs' opposition  
12 to Defendant's summary judgment motion, Mr. Hanni states that  
13 Defendant told him that his "reservation on the 12/30/06 flight  
14 from DFW to Mobile Alabama . . . was still good" as long as he  
15 arrived at the airport on time. Hanni Decl. ¶ 4. Mr. Hanni's more  
16 recent declaration contradicts his deposition testimony. Mr. Hanni  
17 "cannot create a triable issue by contradicting his own sworn  
18 testimony." Nunez v. City of Los Angeles, 147 F.3d 867, 871 (9th  
19 Cir. 1998). Therefore, the Court grants Defendant's summary  
20 judgment motion as it relates to Plaintiffs' breach of contract  
21 claim for denied boarding compensation.

22 V. Breach of Contract for Reasonable Accommodations and Re-  
23 routing

24 Plaintiffs assert a breach of contract claim under two  
25 sections of paragraph eighteen of the COC. The paragraph provides:  
26 When cancellations and major delays are experienced, you will  
27 be rerouted on our next flight with available seats. If the  
delay or cancellation was caused by events within our control  
and we do not get you to your final destination on the

1           expected arrival day, we will provide reasonable overnight  
2           accommodations, subject to availability.

3           In extreme circumstances, it is possible that a flight will  
4           cancel while on the ground in the city to which it was  
5           diverted. When this happens you will be rerouted on the next  
6           American Airlines or American Eagle flight with available  
7           seats, or in some circumstances on another airline or some  
8           other alternative means of transportation. If we are unable  
9           to reroute you, reasonable overnight accommodations will be  
10          provided by American Airlines or American Eagle, subject to  
11          availability.

12          Defendant argues that it did not breach its obligation to provide  
13          Plaintiffs with a voucher for an overnight accommodation on  
14          December 29 in Austin because Plaintiffs never asked Defendant for  
15          such a voucher. Further, Defendant has presented evidence that it  
16          provided vouchers for hotel stays to at least eighteen other  
17          passengers on Plaintiffs' flight. Plaintiffs respond that the line  
18          for the vouchers was too long and that an official at the airport  
19          said that the vouchers were for only ten dollars. However,  
20          Plaintiffs cannot recall whether the airport official was an  
21          American Airline employee or an airport official or if instead they  
22          learned this information from a "rumor." See Kaus Decl. in Support  
23          of Motion to Deny Class Cert., Exh. D at TH000196. Such an  
24          ambiguous assertion does not support Plaintiffs' contention that  
25          Defendant made this statement to Plaintiffs. Without proof that  
26          Plaintiffs sought a voucher from Defendant, Defendant cannot be  
27          responsible for failing to provide such a voucher that night.  
28          Moreover, when Plaintiffs later requested a refund from Defendant  
              for their overnight accommodation, Defendant requested proof of the  
              expense in the form of receipts. Plaintiffs did not provide  
              Defendant with such receipts. Therefore, Plaintiffs' breach of

1 contract claim for failing to provide Plaintiffs with a reasonable  
2 accommodation fails. Further, Plaintiffs do not present any  
3 evidence to dispute Defendant's assertion that they were rerouted  
4 on the next available flight to Mobile. Thus, the Court grants  
5 Defendant's summary judgment motion as it relates to Plaintiffs'  
6 breach of contract claim under paragraph eighteen of the COC. For  
7 the same reasons, the Court denies Plaintiffs' summary judgment  
8 motion.

9 VI. Rule 56(f) Motion

10 Rule 56(f) of the Federal Rules of Civil Procedure provides  
11 that the court may deny or continue a motion for summary judgment  
12 "[i]f a party opposing the motion shows by affidavit that, for  
13 specified reasons, it cannot present facts essential to justify its  
14 opposition." The requesting party must show (1) it has set forth  
15 in affidavit form the specific facts it hopes to elicit from  
16 further discovery, (2) the facts sought exist and (3) the sought-  
17 after facts are essential to oppose summary judgment. Family Home  
18 and Finance Center, Inc. v. Federal Home Loan Mortgage Corp., 525  
19 F.3d 822, 827 (9th Cir. 2008).

20 Because the Court grants summary judgment on the negligence  
21 and conversion claims based solely on issues of law, further  
22 discovery on these claims would be fruitless. Further, the Court  
23 also finds that further discovery on the claims for breach of the  
24 COC paragraphs regarding reasonable accommodations and rerouting  
25 would not reveal essential facts that would successfully oppose  
26 summary judgment. Plaintiffs have not shown that further discovery  
27 on this issue will uncover evidence that Plaintiffs did in fact

1 request a voucher from Defendant or that Defendant told Plaintiffs  
2 that the travel voucher was for only ten dollars. Moreover,  
3 Plaintiffs have not presented any argument as to how further  
4 discovery would establish that Plaintiffs had a reservation on  
5 December 30.

6 VII. Motion For Leave to Seek Reconsideration

7 Plaintiffs move for leave to file a motion to reconsider the  
8 July 11, 2008 Order dismissing the false imprisonment cause of  
9 action. In that Order the Court concluded that Plaintiff Kathleen  
10 Hanni did not sufficiently allege that her confinement on the  
11 aircraft was unlawful. In the instant motion, Plaintiffs argue  
12 that discovery uncovered new material facts that permit Plaintiffs  
13 to make factual allegations which would establish Defendant's lack  
14 of legal authority to keep Plaintiffs on the tarmac for over nine  
15 hours. See Civ. L.R. 7-9(b)(1) and (2). In light of Plaintiffs'  
16 arguments and the exhibits attached in support thereof, the Court  
17 grants Plaintiffs leave to file a motion for reconsideration.  
18 Plaintiffs shall combine this motion in a single brief with a  
19 motion for leave to file a fourth amended complaint and a motion to  
20 certify a false imprisonment class. Plaintiffs' motion will be due  
21 two weeks from the date of this order; Defendant's opposition will  
22 be due two weeks thereafter; and Plaintiffs' reply will be due one  
23 week later. The motion will taken under submission and decided on  
24 the papers.

25 CONCLUSION

26 For the foregoing reasons, the Court (1) DENIES O'Connor's  
27 motion to intervene (Docket No. 302), (2) GRANTS Defendant's motion

1 to deny class certification (Docket No. 201) and DENIES Plaintiffs'  
2 motion for class certification (Docket No. 311), (3) GRANTS  
3 Defendant's motion for summary judgment (Docket No. 196), DENIES  
4 Plaintiffs' motion to continue Defendant's motion for summary  
5 judgment (Docket No. 259) and DENIES Plaintiffs' motion for partial  
6 summary judgment (Docket No. 351) and (4) GRANTS Plaintiffs' motion  
7 for leave to file a motion for reconsideration (Docket No. 337).

8 IT IS SO ORDERED.

9 Dated: 01/15/10

*Claudia Wilken*

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CLAUDIA WILKEN  
United States District Judge

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